In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 462

LEO ZAMARONI, PETITIONER

v.

JAY G. PHILPOTT, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 13–15) is reported at 346 F. 2d 365.

JURISDICTION

The judgment of the court of appeals was filed on May 21, 1965. (Pet. 16.) The petition for certiorari was filed on August 16, 1965. This Court's jurisdiction is invoked under 28 U.S.C. 1254.

790-414—65

QUESTION PRESENTED

Whether the district court properly dismissed, for lack of jurisdiction, this suit to enjoin respondent from assessing tax deficiencies and penalties against petitioner on the basis of certain evidence, allegedly seized illegally from petitioner by State officers.

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.
>
> (a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.
>
> * * * * *
>
> (26 U.S.C. 7421.)

28 U.S.C.:

> SEC. 2201. CREATION OF REMEDY.
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

Petitioner sued to enjoin the District Director of Internal Revenue from assessing tax deficiencies against petitioner on the basis of allegedly illegally seized evidence. (R. 1.)[1] The complaint alleges that State officers illegally seized gambling papers and records from petitioner's premises, and gave them to respondent who is using them to calculate wagering tax deficiencies and penalties against petitioner. Jurisdiction of the district court is asserted under 28 U.S.C. 1340 and the Fourth and Fifth Amendments to the Constitution. The complaint prays that all the items in question be returned to petitioner,[2] and that respondent be enjoined from using them, or any information obtained therefrom, as a basis for assessing tax deficiencies or penalties. (R. 1–3).

The District Director moved to dismiss the complaint, alleging lack of jurisdiction and failure to state a claim upon which relief might be granted. (R. 4–6.) On the jurisdictional issue the District Director urged that the action was barred by sovereign immunity; that it sought declaratory relief contrary to the express provision of 28 U.S.C. 2201; and that it sought to enjoin the assessment of a tax contrary to the express provision of Section 7421(a)

[1] "R." reference are to the appendix filed with petitioner's brief in the court of appeals.

[2] By reason of the return of most of the seized articles to petitioner (R. 5–6), that issue became moot and was not raised in the court of appeals.

of the Internal Revenue Code of 1954. He urged failure to state a claim for relief and lack of equity because of the existence of an adequate remedy at law.

The district court dismissed the suit for lack of jurisdiction. (R. 7.) On appeal the Seventh Circuit affirmed, holding that (Pet. 15),

> the underlying policy manifested by the provisions of both 26 U.S.C.A., § 7421(a) and 28 U.S.C.A., § 2201 leads us to the conclusion that collateral determination of the admissibility of evidence in an administrative tax proceeding or investigation is not a proper sphere for injunctive intervention in the exercise of equitable jurisdiction. * * * "[w]ith reference to the assessment and collection of federal taxes, the courts have only a limited area in which to operate."

ARGUMENT

Petitioner seeks to enjoin the District Director of Internal Revenue from making a tax assessment based on certain evidence which he claims was illegally seized. Petitioner argues that the exclusionary rule of *Elkins* v. *United States*, 364 U.S. 206, should be extended to bar the government from using illegally seized evidence in making administrative determinations. As petitioner admits (Pet. 5, 6), that rule governs the admissibility of evidence in criminal trials. It is an open question whether it applies even to civil trials,[3] except to those forfeiture proceedings which require proof of a criminal offense and which

[3] See *Cleary* v. *Bolger*, 371 U.S. 392, 403, 413 (concurring and dissenting opinions).

are clearly penalties for criminal offenses.[4] *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700–702. We submit that in this context the interference with internal administrative proceedings requested by petitioner is unwarranted, and thus the applicability of the exclusionary rule is not ripe for resolution in the instant case.

Congress has clearly manifested its intention that there be no premature judicial inquiry into administrative tax procedures and collections. Since 1867 there has been a specific statutory prohibition against suits to restrain the assessment or collection of a tax. 26 U.S.C. 7421(a). The Declaratory Judgment Act specifically prohibits such a proceeding with respect to federal taxes. 28 U.S.C. 2201. Finally, Congress specifically enumerated the judicial remedies available to taxpayers, creating only a carefully prescribed method by which a taxpayer could obtain review without first paying a tax. See 26 U.S.C. 6214, 7442; *Flora* v. *United States*, 362 U.S. 145.

This Court has long recognized that the purpose of this legislation "is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue." *Enochs* v. *Williams Packing Company*, 370 U.S. 1, 7.

The only exception to this long standing and salutary rule is that if "on the basis of the information

[4] For the civil nature of a refund suit, even one involving the imposition of civil fraud penalties, see *Helvering* v. *Mitchell*, 303 U.S. 391.

available * * * at the time of suit * * * it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim," so that "the exaction is merely in 'the guise of a tax'," the district court would have jurisdiction to resolve the taxpayer's claim. *Ibid.* This exception rests on the premise that permitting a swift judicial declaration in those cases where the taxpayer is indisputably correct will not delay administrative investigation and collection procedures. On the other hand, permitting lengthy court battles in cases where it is not manifestly clear that the taxpayer will prevail would allow taxpayers, contrary to Congressional intent, to delay the collection of taxes.

It is clear that judicial resolution of petitioner's claim in the instant case would take substantial time and that the outcome is not at all certain. Petitioner's complaint alleges no facts which would establish that an unreasonable seizure had in fact been perpetrated. Resolution of the case would certainly require a full trial on this factual question. Moreover, the legal question—applicability of the exclusionary rule to internal administrative determinations—would (even if the facts were established) require considerable time, both at trial and appellate levels (see *supra*, pp. 4–5). It is therefore clear that, "on the basis of the information available * * * at the time of suit," the instant proceeding could not have been disposed of with dispatch.[5]

[5] It is quite clear that if the Commissioner had made an assessment against petitioner and petitioner had sued to enjoin collection of that assessment on the grounds here alleged, the suit would fall squarely within the prohibition in 26 U.S.C. 7421(a). *Vain* v. *Burton*, 327 F. 2d 967 (C.A. 6).

Furthermore, the controversy here in question is patently premature. As yet there has been no assessment and thus the issue petitioner seeks to litigate may never arise. Even if the Commissioner should subsequently assess a tax against petitioner, it may be based entirely upon evidence independent of the search about which petitioner complains. *Vuin* v. *Burton*, 327 F. 2d 967, 969 (C.A. 6).

In view of the clear Congressional prohibition of injunctions against tax assessments, federal tax officials should be afforded the same protection given to State officials. Last Term this Court said (*Dombrowski* v. *Pfister*, 380 U.S. 479, 484–485 (emphasis added)):

> that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify *a disruption of orderly state proceedings.*

This Court has made it clear that the constitutional basis for the exclusionary rule proclaimed in *Mapp* v. *Ohio*, 367 U.S. 643, does not mean that the federal courts have supervisory power over State officials. *Cleary* v. *Bolger*, 371 U.S. at 397–401; *Ker* v. *California*, 374 U.S. 23, 31. We see no reason why the same rule should not apply to federal tax officials, who are not acting as officers of the court in connection with pending litigation.

The cases upon which petitioner relies (Pet. 8–10) are inapposite. All but one of them involved pre-indictment proceedings to restrain use of evidence in

prospective criminal prosecutions.[*] They were not, therefore, concerned with the specific statutory prohibition against restraint of assessments contained in 26 U.S.C. 7421(a). The sole civil tax case cited, *DeMasters* v. *Arend*, 313 F. 2d 79 (C.A. 9), petition for certiorari dismissed, 375 U.S. 936, is clearly distinguishable. In that case there was no substantial claim that the Fourth Amendment had been violated or that an exclusionary rule applied. The issues dealt with by the court were totally different from those in the instant case. Moreover, the taxpayers there sued to enjoin the Internal Revenue Service from *investigating* a taxpayer's liabilities for certain years. The court made a passing remark in a footnote that the suit there in question was not an action to restrain "the assessment or collection of any tax" within 26 U.S.C. 7421(a). 313 F. 2d at 85, fn. 8. Regardless of the accuracy of that remark, the distinction between an action to restrain the District Director from *investigating* tax liabilities (as there) and a suit to enjoin the District Director from *assessing* tax liabilities (as here) is clear. See 26 U.S.C. 7421(a); *Campbell* v. *Gutersloh*, 287 F. 2d 878, 881 (C.A. 5th).

There is no merit to the argument (Pet. 10–11) based on *Walder* v. *United States*, 347 U.S. 62, and

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[*] *Perlman* v. *United States*, 247 U.S. 7; *Goodman* v. *Lane*, 48 F. 2d 32 (C.A. 8); *In re Fried*, 161 F. 2d 453 (C.A. 2); *Foley* v. *United States*, 64 F. 2d 1 (C.A. 5); *Austin* v. *United States*, 297 F. 2d 356 (C.A. 4). Moreover, subsequent to this Court's decision in *DiBella* v. *United States*, 369 U.S. 121, the Fourth Circuit, on April 6, 1962, set aside its original judgment in the *Austin* case and dismissed the appeal as interlocutory.

Compton v. *United States*, 334 F. 2d 212 (C.A. 4). Those cases strictly limit the government to use of illegally seized evidence for impeachment purposes only, in a case in which the taxpayer takes the stand and commits perjury.

CONCLUSION

For these reasons the applicability of the exclusionary rule to an internal administrative determination is not ripe for resolution in the instant case, and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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